No. 14-361

In the
# Supreme Court of the United States

SAMUEL OCASIO,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## REPLY BRIEF OF PETITIONER

ASHLEY C. PARRISH
ETHAN P. DAVIS
*Counsel of Record*
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
Telephone: (202) 737-0500
Facsimile: (202) 626-3737
Email: edavis@kslaw.com

*Counsel for Petitioner*

January 13, 2015

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

REPLY BRIEF ..... 1

I. The Courts of Appeals Are Divided On the Question Presented. ..... 2

II. The Decision Below Is Wrong. ..... 5

III. The Question Presented is Important and Squarely Presented. ..... 8

CONCLUSION ..... 10

# TABLE OF AUTHORITIES

**Cases**

*Evans v. United States*,
504 U.S. 255 (1992) ..... 6

*Iannelli v. United States*,
420 U.S. 770 (1975) ..... 6

*Public Citizen v. Dep't of Justice*,
491 U.S. 440 (1989) ..... 7

*Skilling v. United States*,
561 U.S. 358 (2010) ..... 9

*TRW Inc. v. Andrews*,
534 U.S. 19 (2001) ..... 6

*United States Nat'l Bank of Ore. v. Independent Ins. Agents of Am., Inc.*,
508 U.S. 439 (1993) ..... 4

*United States v. Brock*,
501 F.3d 762 (6th Cir. 2007) ..... passim

*Yates v. United States v. Yates*,
733 F.3d 1059 (11th Cir. 2013),
*cert. granted* 134 S. Ct. 1935 (2014) ..... 9

**Statutes**

18 U.S.C. § 1951 ..... 2, 5

## REPLY BRIEF

Having prevailed below, the government understandably does not want this Court to grant review. But it offers no meaningful response to the principal reasons why certiorari is warranted. It concedes, as it must, that there is a split in authority over the question presented—whether, in a Hobbs Act conspiracy case, the government must prove that the conspirators agreed to obtain property from someone outside the conspiracy. It makes no serious effort to defend its interpretation of the statute, which relies on the extravagant idea that co-conspirators can conspire to obtain their own consent. It has no answer to the rule of lenity principles addressed in the petition that wholly undermine its position. And it does not deny that this case raises an important, recurring issue about the government's authority to expand the definition of federal crimes.

The government's opposition brief is instead largely focused on manufactured distractions. It claims, for instance, that the split in lower court authority is not "direct" enough because there are factual differences between the lower court cases, and it proposes that perhaps the Sixth Circuit might do something else if confronted with different facts. But the facts highlighted by the government made no difference to the Sixth Circuit's legal holding, which did not turn on particular facts but on its considered judgment of what the Hobbs Act "from another" language requires.

The government also insists that the decision below "is correct," but its arguments only confirm

how extreme and untenable its position is. The government's statutory interpretation depends on the notion that when two or more people conspire to extort property "from another," that includes merely exchanging property between themselves. It requires transforming every payment of a bribe into a conspiracy, even though the Court has never construed the Hobbs Act to criminalize the *paying* of bribes. And it simultaneously sweeps away 18 U.S.C. § 1951(a)'s express distinction between a conspiracy and its substantive offense, rendering every substantive conspiracy a conspiracy to commit extortion.

Finally, the government suggests that this case is not an ideal vehicle to address the question presented because the jury could have found petitioner to be part of a conspiracy that consisted *only* of other Baltimore Police Officers (and not the repair shop owners, Mareno and Mejia, who paid the bribes). But that newly-minted theory cannot be squared with the conspiracy charge set forth in the indictment, much less the way in which the government elected to present its case to the jury and argued it on appeal. Certiorari should be granted.

## I. The Courts of Appeals Are Divided On the Question Presented.

The government cannot reasonably dispute that there is an entrenched split in lower court authority that will not be resolved absent this Court's intervention. *See* Pet. 10–13. It acknowledges that the "Fourth and Sixth Circuits disagree" on the question presented. Opp. 9. It does not dispute that the two lower court opinions are comprehensive and

carefully considered. And it cannot deny that the Fourth Circuit expressly rejected the Sixth Circuit's "contrary *Brock* decision" (App. 21), and that the Sixth Circuit expressly declined to follow Fourth Circuit precedent. *United States v. Brock*, 501 F.3d 762, 769–70 (6th Cir. 2007).

The government nonetheless maintains that the conflict is not direct enough because "the Sixth Circuit did not confront a case like this one in which the defendant was a public official who received a bribe, rather than the bribe-payer." Opp. 9. But that factual distinction is irrelevant to the legal question presented. The court below did not distinguish *Brock* on that factual nuance, and the government's interpretation cannot be squared with what the Sixth Circuit actually said. As the decision below recognized, *see* App. 22, the Sixth Circuit held that to prove a conspiracy to commit extortion, the statute requires the government to show that the conspirators "formed an agreement to obtain property from someone outside the conspiracy." *Brock*, 501 F.3d at 767. That legal holding has nothing to do with whether the defendant paid the bribe or received it.

The government also proposes that the split could resolve itself because "the Sixth Circuit might modify or narrow that rule if confronted with a case such as this." Opp. 11. And if wishes were horses, beggars would ride. But the Sixth Circuit has correctly interpreted the statute and there is no reason to expect that it would convert to the government's flawed reading. Certainly nothing in *Brock* or any other decision suggests that the Sixth

Circuit would change its statutory interpretation merely because a public official is the defendant. Nor is there any reason to wait for the Sixth Circuit to "clarif[y] its position," Opp. 12; its position is already perfectly clear.

In the same vein, the government contends that *Brock* relied on the fact that the defendants there could not be "held liable for the substantive crime of extortion." Opp. 11. That is also wrong. To be sure, the Sixth Circuit noted that "[a]ll agree that the Brocks did not commit a substantive act of extortion," but it made that observation in the context of describing the statutory framework. *Brock*, 501 F.3d at 767. The Sixth Circuit's *holding* turned on its interpretation of what the statutory language requires; the absence of a substantive extortion conviction was irrelevant. *See id.*; *see also United States Nat'l Bank of Ore. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 463 n.11 (1993) (emphasizing "the need to distinguish an opinion's holding from its dicta").

Finally, the government asserts that "the Sixth Circuit's concern about 'transform[ing] the Act into a prohibition on paying bribes to public officials' is not implicated here." Opp. 11. In fact, the decision below achieves exactly that transformation. The Fourth Circuit held that, "where a defendant is charged with conspiring to commit Hobbs Act extortion, the prosecution must show that the object of the conspiracy was for the conspiring public official to extort property from someone other than himself." App. 23. Under that interpretation, the government can impose criminal liability on a bribe-payer merely

by showing that he helped a public official "extort property from someone other than himself," which the government can do simply by showing that the defendant paid a bribe to a public official. Under the Fourth Circuit's interpretation—directly contrary to the Sixth Circuit's interpretation—the Hobbs Act effectively imposes criminal liability on those who *pay* bribes in addition to the officials who receive them. *Compare* App. 23 *with Brock*, 501 F.3d at 767; *see also* Pet. 14–15.

## II. The Decision Below Is Wrong.

The Court should also grant review because the Fourth Circuit's decision mangles the statutory text. *See* Pet. 13–17. Under the Hobbs Act, a conspiracy to commit extortion under color of official right requires that the conspirators agree to obtain property "from another, with his consent"—*i.e.*, from someone outside the conspiracy. 18 U.S.C. § 1951(b)(2). To say that the "another" can be one of the co-conspirators makes no sense; if two people agree to obtain property "from another," an innocent third party has to be involved. And, in any event, if there were ambiguity, the rule of lenity should resolve it in petitioner's favor. *See* Pet. 13; *see also Brock*, 501 F.3d at 768–69.

The government does not grapple with these textual points or with the rule of lenity. Instead, it asserts that "[p]roperty from 'another' refers to property not belonging to that official" and that "the phrase 'with his consent' refers to the consent of someone other than the public official." Opp. 7. But *every* instance of color-of-official-right extortion involves a consensual agreement between a public

official and someone offering money in exchange for the performance of an official act. *See Evans v. United States*, 504 U.S. 255, 268 (1992). If the government's tortured reading were correct, a public official would be guilty of conspiracy whenever the government could prove a substantive violation of § 1951(a)—rendering § 1951(a)'s express distinction between its substantive offense and conspiracy wholly superfluous. *Cf. TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (when interpreting a statute, "no clause, sentence, or word shall be superfluous, void, or insignificant").

The government all but concedes that under its interpretation every substantive conspiracy also constitutes a conspiracy to commit extortion. In fact, the government doubles down on that atextual result, arguing that "if a bribe-payer can be 'another' for purposes of a substantive Hobbs Act violation, it is difficult to see how that same person can lose his status as 'another' solely by virtue of a conspiracy charge." Opp. 8. But that is not difficult to see at all. "The essence of the crime of conspiracy is agreement." *Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975). When one person uses his official position to obtain property from someone else, the public official has obtained property "from another" "with his consent" and can be convicted of the substantive offense of extortion. But when multiple people "agree[]" to obtain property from only themselves, it makes no sense to say that the conspirators have conspired to obtain their own consent. As *Brock* put it, "[h]ow do, (or why would) people conspire to obtain their own consent?" 501 F.3d at 767; *see also* Pet. 13–17 & n.2.

Missing the point, the government suggests that applying the statute as written would be "bizarre" because "[i]f petitioner had been charged of conspiring *solely* with his fellow BPD officers, then both elements—'property from another' and 'with consent'—would be satisfied" but a "conspiracy charge that *also* includes Moreno as a willing participant is beyond the statute's reach." Opp. 8. But the facts of a crime should matter and, under the Hobbs Act, it makes a difference whether petitioner was conspiring to obtain money from the bribe-payer or conspiring to take property from another. There is certainly nothing impossible about Congress distinguishing between situations involving bribes where property is merely exchanged between the conspirators themselves, and situations where the wrongdoers conspire to extort money from innocent victims under color of official right. That is not the kind of absurdity that could justify the "extraordinary" step of rewriting the plain statutory text. *See generally Public Citizen v. Dep't of Justice*, 491 U.S. 440, 471 (1989) (Kennedy, J., concurring in judgment).

Finally, in an effort to avoid concerns about unworkability, the government reinterprets the Fourth Circuit's "active participant" standard to merely restate basic conspiracy principles; the government says that the Fourth Circuit's distinction is equivalent to determining whether a bribe-payer is "simply complying with an official demand" or "knowingly participating in the criminal agreement." Opp. 9. But that puts the government between a rock and a hard place. The government's view of the "active participant" standard resurrects the problem

that standard was meant to solve: the Hobbs Act's "with his consent" requirement ensures that *every* bribe-payer is "knowingly participating in the criminal agreement," so the government's interpretation would turn every substantive extortion offense into an additional conspiracy to commit extortion. If the "active participant" standard is to avoid that problem, it has to do additional work beyond merely requiring a knowing agreement. But if that standard requires courts to "determine what level of enthusiasm, ambivalence, or regret is required to escape prosecution," *Brock*, 501 F.3d at 771, the test is completely vague, unworkable, and unmoored to the statutory text. *See* Pet. 16–17; *Brock*, 501 F.3d at 771. The government's conundrum vividly illustrates why the Sixth Circuit's decision is correct. If the statute is applied according to its plain terms, there is no need for the Fourth Circuit's confusing, extra-textual gloss.

## III. The Question Presented is Important and Squarely Presented.

Seeking to deter this Court from resolving the circuit split and enforcing the statute, the government tries to conjure up an alternative basis for affirmance. According to the government, this case is not an appropriate vehicle because the jury could have found that petitioner did not conspire with Moreno and Mejia, but instead conspired only with other Baltimore Police officers. Opp. 12–13.

That is not how the case was framed or litigated below. Even the government acknowledges that it "did not emphasize the point in its closing argument

or in its appellate brief." Opp. 13. And even if it had, the newly-minted "BPD-only" conspiracy theory is contradicted by what the indictment says. The conspiracy count alleged that petitioner "agree[d] with other [BPD officers], *and with Moreno and Mejia* to unlawfully obtain under color of official right, money and other property *from Moreno, Mejia, and [the Majestic Repair Shop]*, with their consent." App. 4 (emphasis added). Under any tenable reading, the indictment alleges a conspiracy that included an agreement with Moreno and Mejia—the bribe-payers—to obtain property from them (and not from anyone else). The made-up BPD-only position, by contrast, advances a counter-factual theory where Moreno and Mejia were *not* co-conspirators but innocent third-parties. Far from being "factually lesser-included," Opp. 13, the BPD-only conspiracy theory thus directly conflicts with the indictment. It cannot provide an independent basis for affirmance.

Putting aside its many distractions, the government cannot dispute that this case raises recurring and important questions about Congress's power to define and punish federal crimes. *See* Pet. 19–0. That issue has taken on renewed importance in recent years as the government continues on its course of expanding criminal statutes beyond what their text can possibly bear. *See, e.g.*, *Skilling v. United States*, 561 U.S. 358 (2010) (honest services fraud); *Yates v. United States v. Yates*, 733 F.3d 1059 (11th Cir. 2013), *cert. granted* 134 S. Ct. 1935 (2014) (whether a fish is a "tangible object" under the securities laws). The decision below expands the scope of the Hobbs Act in a manner that cannot be

reconciled with what Congress said. And it relies on a strained, open-ended interpretation of the statute that does not give fair notice about what is prohibited. In the end, as this case attests, this Court has an important function in enforcing the rule of lenity and protecting against the creeping expansion of federal crimes. The Court should perform that function here by granting review.

## CONCLUSION

The petition should be granted.

Respectfully submitted,

ASHLEY C. PARRISH
ETHAN P. DAVIS
*Counsel of Record*
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
Telephone: (202) 737-0500
Facsimile: (202) 626-3737
Email: edavis@kslaw.com

*Counsel for Petitioner*